FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A.11)[1] is officially reported at 600 F.2d 407. The opinion of the district court (A.7, 9) is not reported.

JURISDICTION

The judgment of the court of appeals (A.10) was entered on May 30, 1979. The petition for a writ of certiorari was filed *pro se* on July 2, 1979, and was granted on October 9, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

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[1] "A." references are to pages of the Appendix filed in the Court.

QUESTION PRESENTED

Whether the inclusion of a special parole term in petitioner's sentence for violating the federal drug conspiracy law, 21 U.S.C. §846, was authorized, where the statute specifies punishment of "imprisonment or fine or both" and does not refer to the special parole term required for certain substantive drug violations.

STATUTES INVOLVED

TITLE 21, UNITED STATES CODE

§841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) * * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provisions of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant

or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

* * *

(c) Special parole term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(P.L. 91-513, title II, §401, Oct. 27, 1970, 84 Stat. 1260.)

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(P.L. 91-513, title II, §406, Oct. 27, 1970, 84 Stat. 1265.)

STATEMENT OF THE CASE

Petitioner Alphonse Bifulco was charged, in a one-count indictment filed in the United States District Court for the Eastern District of New York, with conspiring to violate 21

U.S.C. §841(a)(1) in violation of 21 U.S.C. §846.[2] It was alleged that the conspiracy was formed to manufacture, possess, and distribute phencyclidine, a Schedule III controlled substance. Petitioner and his co-defendants were tried before a United States District Judge and a jury, and on June 3, 1977, pursuant to a verdict of guilty against him, petitioner was sentenced to a term of imprisonment of four years, a fine of $1,000, and a term of special parole of five years (A.1). On December 15, 1977, the court of appeals affirmed the judgment in all respects (A.2).

By a *pro se* motion to vacate sentence, brought under 18 U.S.C. §2255 and filed on January 17, 1979 (A.3), petitioner contended that the inclusion of a special parole term under his conviction for conspiracy was unlawful in that 21 U.S.C. §846 authorizes only "imprisonment or fine or both" and does not authorize the additional punishment of special parole.[3]

The district court denied the petition in a memorandum filed January 22, 1979 (addendum filed January 30, 1979), holding that special parole was properly included in petitioner's sentence[4] (A. 7, 9).

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[2]A copy of the indictment is annexed to petitioner's brief as Addendum I. Examination of this document reveals that the court of appeals below was incorrect in describing (A.12) the indictment against petitioner as consisting of three counts, a conspiracy count and two substantive counts; and the court was also incorrect in stating that petitioner was acquitted of the two substantive counts. In actuality, petitioner was charged only with conspiracy.

[3]In support of his position, petitioner cited *Fassette v. United States*, 444 F. Supp. 1245 (C.D. Cal. 1978), which held special parole not to be a proper component of a sentence under 21 U.S.C. §846 (A.4-5).

[4]The district court cited the following cases in support of its ruling: *United States v. Burman*, 584 F.2d 1354 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 1026 (1979); *United States v. Jacobson*, 578 F.2d 863 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); and *United States v. Wiley*, 519 F.2d 1348 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976) (A. 7-9).

Petitioner appealed *pro se* to the United States Court of Appeals for the Second Circuit, and in a judgment entered May 30, 1979, upon an opinion filed the same date (A. 10, 11), the court of appeals affirmed. The court's affirmance was rooted in "the weight of authority." The court cited prior cases in which a special parole term imposed under §846 had been approved implicitly,[5] and quoted, approvingly and at length, from three then-recent decisions of other circuit courts of appeals holding special parole applicable to §846.[6] It did not offer any additional analysis of the statutory language.

Petitioner applied to this Court for a writ of certiorari by a *pro se* petition filed July 2, 1979 (A.20). Subsequent to the decision of the court of appeals below, but before petitioner filed his petition in this Court, the United States Court of Appeals for the Third Circuit ruled that special parole was not a lawful component of a sentence under §846,[7] thereby creating a conflict in authority among the circuits. On October 9, 1979, this Court granted certiorari (A.18), and on November 5, 1979, appointed the undersigned to serve as counsel to petitioner.

SUMMARY OF ARGUMENT

The federal drug conspiracy statute, 21 U.S.C. §846, provides for punishment of "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [object] offense. . . ." The object offense involved in this case was subject to punishment consisting of imprisonment and/or fine and, in the event that imprisonment was imposed, an additional

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[5]The cases cited were: *United States v. Armedo-Sarmiento*, note 4, *ante*; *United States v. Wiley*, note 4, *ante*; and *United States v. De La Fuente*, 550 F.2d 309 (5th Cir. 1977) (A.14).

[6]The cases cited were: *United States v. Burman*, note 4, *ante*; *United States v. Jacobson*, note 4, *ante*; and *United States v. Dankert*, 507 F.2d 190 (5th Cir. 1975) (A.14-16).

[7]*United States v. Mearns*, 599 F.2d 1296, 1298-1299 (3d Cir. 1979).

punishment of special parole. The court of appeals held that, notwithstanding the specification of punishment for conspiracy as "imprisonment or fine or both," a special parole term was authorized under §846. That this determination was erroneous is proved by the statutory language, the legislative history, the reasonableness of a literal construction, and the doctrine of lenity.

I.

Section 846 expressly provides for imprisonment and/or fine as the authorized punishments, and because special parole entails a separate form of punishment not listed in §846, a requirement that it be included in a sentence imposed thereunder would conflict with the express command of the statute. This conclusion, moreover, does not defeat the referencing utilized in §846. By establishing not an equalization requirement but only an upper limit based on the referenced section ("which may not exceed"), the referencing is satisfied by the adoption of the imprisonment and/or fine provisions without special parole. Nor does §846 function as a conduit to any other section under which sentencing will be conducted; notwithstanding that §846 takes cognizance of the prison and fine provisions of other sections, sentencing is conducted under §846 itself. Thus, the language and structure of §846 require that the referenced section's prison and fine provisions be addressed only to establish the maximum prison and/or fine which may be imposed for a particular violation of §846.

In defining the scope of punishment authorized under §846's "imprisonment or fine or both" provision, special parole cannot be included as part of the "imprisonment" provision. Throughout this subchapter in which the penal provisions related to drug abuse are enumerated and maximum terms of imprisonment for various criminal acts are set, special parole is authorized in fewer than half of these sections; when special parole is intended to be

part of the punishment, it is separately specified. Furthermore, §841 expressly describes special parole as a punishment additional to prison; by its own definition, it does not constitute a part of imprisonment. Therefore, the term "imprisonment" in §846 does not, by its own force, authorize special parole. The fact that a prison sentence imposed under the referenced substantive section, §841(b)(1)(B), would be supplemented by a special parole term does not establish that imprisonment for this §846 violation can be likewise supplemented. It is not the imprisonment provision in §841(b)(1)(B) which authorizes its special parole, but the separate special parole provision—the very authorization absent from §846.

II.

Rather than raising any doubt as to following the plain meaning of the language used in §846, the legislative history supplies support for our view that "imprisonment or fine or both" was intended to be read literally and to exclude special parole. An examination of the various predecessor bills of both houses demonstrates that Congress never varied in its specification of the punishment applicable to conspiracy. Moreover, the evolution of this legislation establishes that the phrase "imprisonment or fine or both" was resolutely maintained even after other sections were amended to provide for special parole. There is nothing in the legislative materials relating to the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which the sections here in issue were enacted, that reveals an intent that special parole be applicable to the conspiracy section. By contrast, Congress' response to special parole in other sections speaks its mind clearly: a statutory provision intended to be affected by the enactment of the special parole provision is one which was explicitly amended to reflect this fact (*e.g.*, §845). Congress' failure to amend §846 to include special parole appears in every respect to have been purposeful. Certainly, this history

does not provide grounds for adopting a construction of §846 at odds with its language.

III.

There is also no basis for denying the statutory language its due on the ground that the result is unreasonable or in conflict with the purposes of this legislation. Conspiracy has traditionally been punished by imprisonment and/or fine, and our construction of §846 will result in the continuity of long applicable punishments. Also, as noted previously, many of the crimes in this subchapter punished by imprisonment do not carry additional special parole terms. The preclusion of special parole, therefore, will not render the treatment of conspiracy unique or unreasonable vis-a-vis other drug crimes. The fact that literal effectuation of the language will result in different punishments for conspiracy and, in certain circumstances, the substantive acts underlying that conspiracy, does not establish an unacceptable scheme. Indeed, a penalty structure for various conspiracies totally independent of that for assorted substantive acts is found in numerous provisions throughout the United States Code and has long been regarded as rational. The provision of §846 that conspiracy is to be punished by "imprisonment or fine or both" is thus a reasonable legislative determination, and enforcement of this provision cannot be denied.

IV.

Should the Court view the statutory language and the legislative history as less than definitive, they nevertheless provide some support for our position. Thus, there must be some doubt in petitioner's favor with respect to the applicability of special parole to conspiracy; and the Government, at the most, can show that the statute is ambiguous. Under the doctrine of

lenity, which is applicable to sentencing statutes, the Government's interpretation cannot be adopted. The narrower interpretation—that precluding the inclusion of special parole—is the proper reading.

ARGUMENT

SPECIAL PAROLE IS NOT AN AUTHORIZED COMPONENT OF A SENTENCE IMPOSED UNDER THE FEDERAL DRUG CONSPIRACY STATUTE, 21 U.S.C. §846.

Petitioner, having been convicted of participation in a drug conspiracy, was subject to the punishment specified in 21 U.S.C. §846: "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [object] offense. . . ." The terms of this section establish that the forms of punishment for conspiracy are imprisonment and fine. However, the substantive offense which was the object of the conspiracy at bar, defined in 21 U.S.C. §§841(a)(1) and 841(b)(1)(B), was subject to imprisonment not more than five years and/or fine not more than $15,000, and in the event that imprisonment was imposed, an additional punishment of special parole of at least two years.

The requirement that special parole be included for several of the substantive crimes which may underlie a §846 conspiracy has given rise to the question of whether special parole applies to a violation of the conspiracy section. This section refers to the punishment provisions of the substantive section defining the object offense to set its maximum limits, but delineates the punishment for conspiracy as "imprisonment or fine or both" exclusively. Though a majority of the courts of appeals which have addressed this question have concluded that special parole is an authorized component of a conspiracy sentence,[8] it will be

[8]Five circuit courts of appeals have held special parole to be applicable to §846: the Second Circuit (the instant case, A.11, 13-17); the *(continued)*

demonstrated herein that the minority view, which restricts the punishment for conspiracy to imprisonment and/or fine, is correct.

I.

The Language And Structure Of §846 Itself Compel A Reading Which Limits Punishment Thereunder To Imprisonment And/Or Fine, And Prohibits Inclusion Of A Special Parole Term.

The starting point in this case is the statutory language itself.[9] While those courts of appeals which have upheld the inclusion of

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(footnote continued from preceding page)

Fourth Circuit (*United States v. Burman*, 584 F.2d 1354, 1357-1358 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 1026 (1979)); the Fifth Circuit (*Cantu v. United States*, 598 F.2d 471, 472 (5th Cir. 1979); *cf. United States v. Dankert*, 507 F.2d 190, 191 (5th Cir. 1975)); the Eighth Circuit (*United States v. Sellers*, 603 F.2d 53, 58-59 (8th Cir. 1979)); and the Tenth Circuit (*United States v. Jacobson*, 578 F.2d 863, 867-868 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978)). One court of appeals has held special parole to be inapplicable to §846: the Third Circuit (*United States v. Mearns*, 599 F.2d 1296, 1297-1299 (3d Cir. 1979); see also *United States v. Jacquinto*, 464 F.Supp. 728 (E.D. Pa. 1979) (Lord, *J.*)). Whereas we are not aware of any other circuit's ruling on the issue, a district court decision holding special parole inapplicable to §846 has been regarded as the leading case on point in the Ninth Circuit (*Fassette v. United States*, 444 F.Supp. 1245, 1246-1248 (C.D. Cal. 1978) (Hill, *J.*)). Though the weight of authority is against our position, it should be noted that the same numerical split existed prior to this Court's decision in *United States v. Bass*, 404 U.S. 336, 338 n.3 (1971).

[9]In *Blue Chip Stamp v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), Mr. Justice Powell, concurring, noted: "The starting point in every case involving construction of a statute is the language itself." See also *Touche Ross & Co. v. Redington*, ____ U.S. ____, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82, 91 (1979); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977). Strict adherence to the statutory language

special parole in a conspiracy sentence have purported to examine the language and structure of §846, they have in fact advanced a reading which distorts the terms and functioning of this statute, and ignored the governing rules of construction. A correct reading of the statutory language demonstrates that special parole cannot constitute a lawful component of a conspiracy sentence because §846 establishes only a limited reference to an associated substantive section—one which does not result in incorporation, equalization, or merger—and because the overall statutory scheme reveals that special parole is applicable to a particular criminal act only if it is expressly authorized in the applicable sentencing section.

A.

Section 846 states that attempt or conspiracy is "punishable by imprisonment or fine or both" (hereinafter referred to as the "first clause") which is "not to exceed the maximum punishment prescribed for the [object] offense" (hereinafter referred to as the "second clause"). Three points demonstrate that, notwithstand-

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does not alone guarantee a reading consistent with the legislative intent. See, *e.g.*, *United States v. Campos-Serrano*, 404 U.S. 293, 298-299 (1971); see also *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976). However, the plain language itself is entitled to some presumptive validity as the reflection of Congressional intent. See, *e.g.*, *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330-331 (1978); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200-201 (1976); *Burns v. Alcala*, 420 U.S. 575, 580 (1975); *Bouie v. City of Columbia*, 378 U.S. 347, 355-356 (1964); *Richards v. United States*, 369 U.S. 1, 9 (1962). And in the context of a criminal statute, "the precise language of the provision must not be deprived of all force. The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute." *United States v. Campos-Serrano, supra*, 404 U.S. at 299; see also *United States v. Wiltberger*, 5 Wheat. (18 U.S.) 76, 95-96 (1820) (Mr. Chief Justice Marshall).

ing its reference to a substantive section which might itself include special parole, the language and structure of §846 do not define a sentencing process whereby special parole is adopted from the referenced substantive section. First, §846 lists only two forms of punishment—imprisonment and fine—and does not, explicitly or implicitly, provide for special parole. Second, the second clause does not establish an equalization of punishment between conspiracy and the object offense, but merely sets an upper limit for punishment imposed under §846. Third, §846 does not transfer the sentencing function to any other section, but is itself a sentencing section which defines its own operation.

1. To avoid the plain statutory limitation of punishment to imprisonment and/or fine, the word "punishment" in the second clause has been incorrectly construed to be a reference broader in scope than "imprisonment or fine or both" in the first clause—one which encompasses the additional punishment of special parole. See A.13-14; see also *United States v. Sellers*, 603 F.2d 53, 59 (8th Cir. 1979); *United States v. Jacobson*, 578 F.2d 863, 868 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978). This interpretation takes an inappropriate liberty with the statutory language. While the word "punishment," a generic term, could in the abstract encompass any variety of sentencing options, it appears in §846 following the specific terms "imprisonment" and "fine." Under the rule of *ejusdem generis*,[10] "punishment" would signify "imprisonment or fine or both." This conclusion is further supported by the fact that "imprisonment or fine or both" in the first clause is introduced by the term "punishable," which provides a direct link to the word "punishment" in the second clause.[11] And were the term "punishment"—independently of its antecedent clause—deemed to define the range of sentencing options applicable under §846, the very substance of that first clause,

[10] *E.g., United States v. Powell*, 423 U.S. 87, 90-91 (1975); *Gooch v. United States*, 297 U.S. 124, 128 (1936).

[11] This interpretation is supported by the rule that a word is known by the company it keeps—*noscitur a sociis*. *E.g., Jarecki v. Searle & Co.*, 367 U.S. 303, 307 (1961).

"imprisonment or fine or both," would be pointless. This would offend the rule that no portion of a statute should be read to be surplusage.[12]

2. Section 846 does not require that its punishment be equated to that of an associated substantive section; it speaks of punishment not to exceed that provided in the referenced substantive section. Thus, while Congress was free to establish an equivalency by stating that conspiracy or attempt was subject to punishment equal to that of the object offense,[13] it instead adopted language which contemplates the possibility of a sentence less severe than that of the substantive section. Because a §846 sentence without special parole would "not exceed" the sentence of the referenced substantive section, the structure of §846 cannot be held to mandate the inclusion of special parole under §846. Precisely this point was ignored by the Second Circuit, A.14-15, and other courts of appeals which upheld special parole terms imposed under §846 on the view that its reference to an associated substantive section required replication of punishments. See, *e.g., United States v. Sellers, supra*, 603 F.2d at 59; *Cantu v. United States*, 598 F.2d 471, 472 (5th Cir. 1979); *United States v. Burman, supra*, 584 F.2d at 1358; *cf. United States v. Dankert*, 507 F.2d 190, 191 (5th Cir. 1975). Proof that a mandatory term of special parole is adopted by reference cannot derive from words of reference which are satisfied when special parole is precluded under §846, and these cases are incorrect insofar as they find authority to impose special parole in the language of §846.

3. Section 846 utilizes reference to an associated section not to structure a conduit to another sentencing provision but to establish the range of sentences which are permissible under §846

[12] See, *e.g., United States v. Menasche*, 348 U.S. 528, 538-539 (1955); *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *Wilderness Society v. Morton*, 479 F.2d 842, 856-857 (D.C. Cir. *en banc*), *cert. denied*, 411 U.S. 917 (1973).

[13] See *United States v. Mearns*, 599 F.2d 1296, 1298 (3d Cir. 1979); *Fassette v. United States*, 444 F. Supp. 1245, 1247 (C.D. Cal. 1978).

itself. Had Congress intended merely to criminalize attempt and conspiracy and to provide for sentencing under the statutory provision applicable to the object offense rather than under a distinct sentencing procedure, it would have been unnecessary to enact a separate sentencing section. Attempt and conspiracy could have been designated crimes under the substantive sections and punished thereunder, as had been done under the former law.[14] Congress, however, created a separate punishment provision and endowed it with its own sentencing authority, indicating that virtual independence was intended for conspiracy sentencing. The existence of §846, and its express concern with sentencing for attempt and conspiracy, establish that conspiracy is punished under §846 and not under the referenced section. Thus, the reasoning of the court of appeals, A.14-15, and the cases cited at 13, *ante*, that special parole applies to §846 because of the latter's use of reference not only misperceives the limited scope of this reference, but attributes a passiveness to §846 which is not reflective of this section's true function and functioning in sentencing.

B.

Contrary to the suggestion of several courts of appeals (see A.15-16; *United States v. Sellers, supra*, 603 F.2d at 58-59; *United States v. Burman, supra*, 584 F.2d at 1358; and *United States v. Jacobson, supra*, 578 F.2d at 868; but see *United States v. Mearns*, 599 F.2d 1296, 1298 (3d Cir. 1979)), a special parole term may not be imposed under §846 on the theory that it constitutes an integral part of the "imprisonment" authorized therein. While special parole is imposed only in conjunction with a prison sentence, and when applicable, is a mandatory component of

[14]See 21 U.S.C. (1964 ed.) former §§174; 176a, 176b; see also 26 U.S.C. (1964 ed.) former §§7237(a), 7237(b).

sentencing,[15] it does not follow that special parole is part of a sentence of imprisonment and that it requires no independent authorization in a sentencing statute.

Initially, it bears noting that Congress did not assign special parole to every substantive drug law violation which was punished by imprisonment.[16] The following chart sets forth those drug law violations which carry a possible sentence of imprisonment along with a description of the authorized sentences.

[15]Special parole, when authorized, is a compulsory supplement to imprisonment (*e.g.*, §841(b)(1)(B): "Any sentence imposing a term of imprisonment under this paragraph *shall* . . . impose a special parole term of at least two years in addition to such term of imprisonment . . ." (emphasis supplied)). Nothing in the statutory language or history allows the conclusion that special parole is applicable as an optional sentencing choice; and the fact that special parole terms are set according to a schedule of mandatory minimums indicates that, when special parole is authorized, a sentencing court may not avoid imposing a substantial sentence. Thus, the issue at bar is not whether special parole may be included in petitioner's sentence, but whether it must be.

[16]Special parole—the additional parole term appended to a criminal prison sentence and operative after any regular parole obligation incident to the imprisonment has been fulfilled—was created in the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, under which these penal sections were enacted (see Part II-A, *post*). Special parole has never been included in any other act of Congress, and it is not applicable to any other criminal sentencing provision established by Congress in any other penal section. Moreover, our research has indicated that no such provision is found in any state penal legislation. The extreme consequences of special parole and several other questions raised by special parole (but not squarely presented by the facts of this case) are summarized in note 26, *post*.

Section[17]	Crime[18]	Penalty[19]
(1) 841(b)(1)(A)	manufacture, distribute or dispense, or possess with such intent, a schedule I or II controlled substance which is a narcotic drug	imprisonment not more than 15 years and/or fine not more than $25,000; with imprisonment, special parole at least 3 years
(2) 841(b)(1)(B)	same as *(1)* except applicable to schedule I or II controlled substances not a narcotic drug, or any schedule III controlled substance	imprisonment not more than 5 years and/or fine not more than $15,000; with imprisonment, special parole at least 2 years

[17]All sections included are within Title 21 of the United States Code, Chapter 13 (Drug Abuse Prevention and Control), Subchapter I (Control and Enforcement), Part D (Offenses and Penalties). Not included in the chart, but to be noted, are those penal provisions pertaining to import and export of controlled substances, which appear within Title 21 of the United States Code, Chapter 13, Subchapter II (Import and Export). The origins of the separation of distribution and import/export offenses are alluded to in note 28 and Part II-A, *post*. The arguments offered as to the interpretation of §846 are fully applicable to §963, the conspiracy section under subchapter II.

[18]A number of the crimes are defined by reference to the schedules of controlled substances. These schedules are found in 21 U.S.C. §812.

[19]The penalties specified are for first offenses. The crimes defined in this subchapter contain second offender sentencing provisions within each individual section. The additional penalty for multiple offenders is not reflected in the penalty column. Generally, the second offender penalty provisions for each section provide for the doubling of the specified imprisonment, fine, and special parole terms.

Section	Crime	Penalty
(3) 841(b)(5)[20]	same as *(1)* except applicable to phencyclidine specifically (phencyclidine removed from *(2)* above, which applied prior to adoption of this provision in 1978)	imprisonment not more than 10 years and/or fine not more than $25,000; with imprisonment, special parole at least 2 years
(4) 841(b)(2)	same as *(1)* except applicable to schedule IV controlled substances	imprisonment not more than 3 years and/or fine not more than $10,000; with imprisonment, special parole at least 1 year
(5) 841(b)(3)	same as *(1)* except applicable to schedule V controlled substances	imprisonment not more than 1 year and/or fine not more than $5,000
(6) 841(d)[21]	possession of piperidine with intent to manufacture phencyclidine (see *(3)*)	imprisonment not more than 5 years and/or fine not more than $15,000

[20]Section 841(b)(5) was added by amendment to this subchapter in P.L.95-633, Title II, §201 (November 10, 1978, 92 Stat. 3774). It provides for the increase of penalties for crimes involving the distribution of phencyclidine, defined in 21 U.S.C. §830(c)(2), the substance involved in the conspiracy for which petitioner was convicted. At the time of petitioner's prosecution, phencyclidine was still covered by §841(b)(1)(B).

[21]Section 841(d) was added by amendment to this subchapter in P.L.95-633, Title II, §201 (November 10, 1978, 92 Stat. 3774). Under §203(d) of P.L.95-633, this section (21 U.S.C. §841(d)) is repealed effective January 1, 1981.

Section	Crime	Penalty
(7) 842(c)(2)	various infractions by manufacturers, distributors, and dispensers of controlled substances (registered under Part C of Chapter 13, subchapter I), but only when committed knowingly	imprisonment not more than 1 year and/or fine not more than $25,000
(8) 843(c)	same as *(7)* except applicable to more serious infractions (as designated); possession through fraud, counterfeit substances, use of communication facility with respect to violation of drug laws	imprisonment not more than 4 years and/or fine not more than $30,000
(9) 844(a)	simple possession of controlled substance; also (by dint of §841(b)(4)) distribution of small amount of marihuana without remuneration	imprisonment not more than 1 year and/or fine not more than $5,000
(10) 845(a)	distribution of controlled substance to person under age twenty-one by person at least eighteen	imprisonment and/or fine not more than twice that authorized under appropriate subsection (by substance) of §841(b) (see *(1)-(5)*); special parole at least twice that authorized under appropriate subsection (by substance) of §841(b) (see *(1)-(5)*)

Section	Crime	Penalty
(11) 846	attempt; conspiracy; applicable to any drug offense	imprisonment and/or fine not more than maximum punishment prescribed for object offense
(12) 848(a)[22]	continuing criminal enterprise	imprisonment not less than 10 years with maximum up to life, and fine not more than $100,000; and designated forfeitures

[22]Section 848(a) establishes the crime of continuing criminal enterprise, which is defined in §848(b) as follows:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Also pertinent to this discussion is §849, which does not establish a punishable unlawful act but provides a special sentencing procedure applicable to a "dangerous special drug offender."[23] In the event that a defendant convicted of a drug felony is found by the sentencing judge, after a hearing, to be a dangerous special drug offender, he will be subject to imprisonment for a term not to exceed twenty-five years (§849(b)).

Thus, while special parole is specifically required when prison is imposed for chart entries *(1)*, *(2)*, *(3)*, *(4)*, and *(10)*, it is not authorized with respect to prison sentences imposed under chart entries *(5)*, *(6)*, *(7)*, *(8)*, *(9)*, *(11)*, and *(12)*, nor is it a proper component under the dangerous special drug offender provision. These data indicate that Congress intended no automatic inclusion of special parole from the single fact of imprisonment; special parole was to be included only when specified.[24] The fact that §846 refers to other sections, and in this case to §841(b)(1)-(B), for the maximum amount of prison and/or fine applicable does not alter this proposition, as is demonstrated by §845 (distribution to persons under age twenty-one).[25] There, as in

[23]A conclusion that a person is a "dangerous special drug offender," as defined in §849, requires two findings. The first is that the convicted person is a "special drug offender," that is, a person who has two or more prior drug offense convictions, or is involved in a pattern of dealing in controlled substances resulting in a substantial source of income, or plays a supervisory role in a drug conspiracy with three or more other participants. Section 849(e)(1), (2), and (3). Second, a defendant must be found to be "dangerous," which entails a determination by the court that a period of confinement longer than that provided for the crime committed is required for protection of the public. Section 849(f).

[24]This Court has often remarked that legislative intent is best revealed not in an isolated section, but in an entire statute. See, *e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *Richards v. United States*, 369 U.S. 1, 11 (1962).

[25]Section 845(a) provides:

> Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a

(continued)

§846, reference to another section is utilized to establish the amount of imprisonment and/or fine, which varies in proportion to the seriousness of the conduct as reflected in the referenced section. However, in §845, unlike §846, the inclusion of special parole is separately and specifically mandated. The absence of a corresponding special parole provision in §846, which immediately succeeds §845, is substantial evidence that Congress intended that §846 was to provide for a sentence of imprisonment which would not be supplemented by a special parole term.

Indeed, the very concept that special parole may be viewed as a part of imprisonment seriously conflicts with the distinctly independent status accorded special parole in §841. Section 841(c) provides: "A special parole term . . . shall be in addition to, and not in lieu of, any other parole provided for by law." Moreover, those sections of §841 which prescribe a special parole term to accompany imprisonment address it as being "in addition to such term of imprisonment." That special parole, when authorized, carries a mandatory minimum and no maximum, and that special parole, when revoked (§841(c)), results in a prison term equal in length to the special parole term imposed, illustrates that special parole in practice can constitute a considerable addition to a prison sentence.[26] The fact that Con-

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> person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule.

[26]Indeed, special parole can be a uniquely harsh sentencing provision. Although the terms of imprisonment are set forth under all sections of this subchapter except §848 (continuing criminal enterprise) as having maximum limits with no minimums, the statute requires special parole to be imposed in accord with mandatory minimum but no maximum limits. Because the revocation provision (§841(c)) states that "[t]he original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of

(continued)

gress intended special parole to be additional to imprisonment, and not merely an implicit part of a prison term, as is standard parole,[27] is proof that a reference to "imprisonment" alone does not mean imprisonment plus special parole.

Once it becomes manifest that imprisonment does not *ipso facto* give rise to special parole, the view expressed on the meaning of imprisonment in those court of appeals decisions cited at 14, *ante*, must fail. It may be true, as noted in *United States v. Jacobson, supra*, 578 F.2d at 868, that "a [special] parole

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imprisonment shall not be diminished by the time which was spent on parole," the special parole term may become a period of imprisonment for more than that imposed in the original prison sentence.

This anomaly is by no means the only one raised by the special parole provision. Another is that special parole is added to regular parole, regardless of a person's performance on parole or his need for further supervision. In this respect, special parole should be contrasted with various proposed parole amendments in legislation now pending before Congress. These recommendations focus on elimination of the existent scheme dividing a prison sentence into a period of incarceration and a period of parole. In the traditional division, the length of the parole term is based not on an assessment of need for supervision, but on the fixed amount of the prison sentence remaining when parole is granted. The proposals include a parole term which is somewhat independent of the originally imposed prison sentence. See, *e.g.*, S.1722 (96th Cong., 1st Sess., September 7, 1979), §2303 (Inclusion of a Sentence of Supervised Release After Imprisonment), §3824 (Release of a Prisoner); S.Rep. No. 95-605 (Part I) of the Judiciary Committee, November 15, 1977, to accompany S.1437 (95th Cong., 1st Sess.), at 931-933 (discussing S.1437, §2303); Final Report of the National Commission on Reform of Federal Criminal Laws (1971), §3201 (Sentence of Imprisonment: Incidents), and Chapter 34 (Parole: §§3401-3406); Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. II (1970) at 1312-1317) (*re*: §3201), 1329-1335 (*re*: Chapter 34—Parole). Whereas the proposed parole system is intended to assure a more rational relationship between imprisonment and parole, special parole exacerbates deficiencies in the current system.

[27]Parole is governed by the provisions of Title 18 of the United States Code, Chapter 311, §§4201 *et seq.*

term may never be imposed without imprisonment," but the converse is not true—imprisonment need not be accompanied by special parole. Throughout this chapter, the inclusion of special parole is tied not to imprisonment but to specific statutory authorization. Consistent with this design, "imprisonment" in §846 should not be read as alone effecting the inclusion of the additional special parole term.

II.

That Congress' Retention Of "Imprisonment Or Fine Or Both" In §846 Was Purposeful And Intended To So Limit The Punishment For Conspiracy Is Amply Supported By The Legislative History.

Section 846 was enacted under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereinafter "Comprehensive Act").[28] The various legislative materials reflecting this section's development disclose a consistent and long-standing adherence to specification of the punishment applicable to §846 as "imprisonment or fine or both." This history demonstrates, moreover, that Congress' failure to amend §846 to include special parole was purposeful and not an accidental oversight. These materials, at the very least, indicate

[28]The Comprehensive Act, P.L.91-513 (84 Stat. 1236), enacted October 27, 1970, see 116 Cong. Rec. 37349 (91st Cong., 2d Sess., 1970), is codified under Title 21 of the United States Code, in Subchapters I and II of Chapter 13. Subchapter I, encompassing Titles I (rehabilitation) and II (law enforcement) of the Comprehensive Act, contains the penal provisions pertaining to distribution of controlled substances here in issue (Part D, encompassing §§841-851). Subchapter II, encompassing Title III (import/export) of the Comprehensive Act, includes penal provisions pertaining to import and export of narcotics. See Part II-A, *post*, for historical information on the legislative origins of these subchapters.

that the statutory language is not in conflict with any stated intention of Congress, and thus do not provide the Government with the evidence necessary to impose a reading at odds with the wording of §846.[29]

A.

Action in the Ninety-first Congress to develop a comprehensive statute pertaining to drug abuse began in the Senate in 1969. The two most significant preliminary Senate bills, from which S.3246, the bill passed in the Senate, was descended, were S.1895[30] and S.2637.[31] These bills were referred to the Judiciary Committee and were the subject of hearings before the Subcomittee to Investigate Juvenile Delinquency conducted on September 15, 17, 18, 24, 25, 26, and 29, and October 20, 1969.[32] Both bills defined conspiracy (with attempt) in a separate section employing the same basic wording on sentencing—imprisonment and/or fine—as does §846 (though S.1895 provided for the halving of the applicable imprisonment and/or fine for attempt, whereas S.2637 upgraded attempt to be equal to conspiracy) (S. 1895, §704, see Hearings at 74-75; S.2637, §504, see Hearings at 166). However, the conspiracy sections of these bills were the subject of no testimony or comment at these hearings.

[29]Of course, the value of the legislative history to reveal the intent of Congress is inversely proportional to the clarity of the statutory language employed. Compare *TVA v. Hill*, 437 U.S. 153, 184-185 (1978), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977), with *Cass v. United States*, 417 U.S. 72, 77-79 (1974), *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972), and *United States v. Donruss Co.*, 393 U.S. 297, 302-303 (1969).

[30]S. 1895 was titled the Omnibus Narcotic and Dangerous Drug Control and Addict Rehabilitation Act of 1969.

[31]S. 2637 was titled the Controlled Dangerous Substances Act of 1969.

[32]Also a subject of these hearings was S. 2590, which established a marihuana commission.

Special parole, which was not included in these bills, received its first mention at the hearings. In the discussion of the sentencing provision alternatives proposed by the Office of the Attorney General (see Hearings at 215, 255), John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice, offered some general observations about a special parole term designed to provide a period of post-sentence supervision.[33] However, Mr. Ingersoll's comments did not address the issue of special parole's applicability to the conspiracy section; the alternative schemes did not themselves indicate that the special parole recommendation applied to the conspiracy section; and there was no further discussion by the Subcommittee on the operation of this special parole recommendation (see Hearings at 663-683).

On January 28, 1970, a new bill, S.3246,[34] passed in the Senate. This bill incorporated various changes, including, in S.3246, §501 (prohibited acts/penalties pertaining to substantive distribution and import/export violations), a provision for a special parole term to accompany the prison sentences provided therein. The section on attempt (here "endeavor") and conspiracy, S.3246,

[33]Mr. Ingersoll stated:

> Another requirement that has been included in the alternative penalty schemes is a special parole term which is a part of the illicit trafficking sentence structure. Just as incarceration is not always a meaningful answer to effective rehabilitation, certainly incarceration without an adequate supervisory follow-up after release is not in the best interest of society.
>
> Therefore, we have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentences probated or suspended. The intent here is to give the judges another tool for sentencing and another means of protecting society when dealing with the drug violator.
>
> (Hearings at 676.)

[34]S. 3246 was titled the Controlled Dangerous Substances Act of 1969.

§504, is set forth in terms equivalent to §846.[35] Similarly, both in the "Scope of Coverage" and "Section-by-Section Analysis" sections of the Senate Report[36] which accompanied the bill, S.3246, §504 is described with explicit reference to "imprisonment or fine or both" exclusively, with no commentary suggesting the applicability of the new special parole provision.[37]

In the floor debates regarding the various bills here discussed, statements respecting special parole and conspiracy were all but non-existent, but several comments related to these topics appeared in connection with S.3246. Senator Hruska, speaking of the function of the drug schedules in determining penalties for traffickers, described special parole as "a relatively new concept, but one which will provide necessary post-incarceration supervision."[38] Because the Senator's remarks were not made with reference to any specific penal section, his statement does not shed light on the intended applicability of special parole. However, some indication may be found in a chart comparing the punishments provided under the then-current federal law and S.3246, offered by Senator Dodd[39] on the very day the Senate approved S.3246. In setting forth the punishments for conspiracy under each scheme, the chart shows that the punishment for conspiracy would not be changed under S.3246 but would

[35]S. 3246, §504 provides:

> Any person who endeavors or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the endeavor or conspiracy.

[36]S.Rep. No. 91-613 of the Judiciary Committee, December 16, 1969, to accompany S.3246; see 115 Cong. Rec. 39253 (91st Cong., 1st Sess., 1969).

[37]S. Rep.No. 91-613, note 36, *ante*, at 9, 26.

[38]See 116 Cong. Rec. 1665 (91st Cong., 2d Sess., 1970).

[39]See 116 Cong. Rec. 1653-1654 (91st Cong., 2d Sess., 1970). A copy of the chart offered by Senator Dodd on the floor of the Senate is annexed as Addendum II to petitioner's brief.

remain imprisonment and/or fine not to exceed the maximum punishment prescribed for the associated offense. Thus, the information before the Senate reflected that the new bill effected no change in punishment authorized for conspiracy as compared to the then-current provisions.

In the House of Representatives, the predecessor of H.R. 18583, the bill ultimately passed (with amendments) in both houses as the Comprehensive Act, were H.R. 13742/13743[40] and H.R. 17463.[41] The two former bills did not contain a special parole provision; the latter (H.R. 17463) did provide for special parole in conjunction with imprisonment imposed under H.R. 17463, §501, the section corresponding to 21 U.S.C. §841.

Hearings on H.R. 13743[42] were conducted before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce on February 3, 4, 17, 18, 19, 20, 25, 26, and 27, and March 2 and 3, 1970. On the subject of attempt and conspiracy, H.R. 13743, §504 punished each by imprisonment and/or fine not to exceed the punishment prescribed for the object offense. In testifying before this Subcommittee, Mr. Ingersoll described the punishment applicable to conspiracy in the Senate bills (S.1895 and S.2637), the three Justice Department sentencing alternatives, and the then-current federal law in identical terms: "imprisonment and/or fine" (Hearings at 92).

[40]H.R. 13742 was titled the Controlled Narcotic Drug Act of 1969. H.R. 13743 was titled the Controlled Depressant and Stimulant Drug Act of 1969. The former bill was referred to the Committee on Ways and Means because that Committee had jurisdiction over various laws used to control narcotic drugs. The latter was referred to the Committee on Interstate and Foreign Commerce because that Committee had jurisdiction over the Federal Food, Drug, and Cosmetics Act, under which the depressant and stimulant drugs covered in H.R. 13743 were regulated.

[41]H.R. 17463, which was given no short title, unified H.R. 13742 and H.R. 13743 into a single bill, and also incorporated numerous new features which, as relevant, are considered above.

[42]Also a subject of these hearings was H.R. 11701, an earlier version not here relevant.

The three Justice Department alternatives presented by Mr. Ingersoll all made provision for special parole as to the substantive sections corresponding to §841, but neither in his discussion of these alternatives nor in his recital of the punishment provisions of the various approaches described did Mr. Ingersoll suggest the applicability of special parole to attempt or conspiracy.

H.R. 13742, though focusing on different controlled substances than H.R. 13743, resembled the latter in all relevant respects. H.R. 17463, which, as noted, added special parole to the House's proposed legislation, did not amend the attempt and conspiracy section. Sections 504 of both H.R. 13742 and H.R. 17463 were identical (except for the change of terminology from "attempt" to "endeavor") and, as in every preceding formulation, specified the applicable punishment for conspiracy as imprisonment and/or fine. H.R. 13742 and H.R. 17463 were the subject of hearings before the Committee on Ways and Means held on July 20, 21, 22, 23, and 27, 1970, but there was no direct consideration of special parole. The only material before the Committee which bore on the applicability of special parole to conspiracy was a report and accompanying chart prepared by the Justice Department summarizing the provisions of the then-current federal law and H.R. 17463 (see Hearings at 221-225, 229-230). Whereas a column in the chart for indicating whether special parole was applicable was provided on the page on which the substantive crimes were listed, that column was deleted on the succeeding table page, on which conspiracy appeared (see Hearings at 229-230).[43]

Following these hearings, a new bill emerged from the Subcommittee on Public Health and Welfare, H.R. 18583, which was

[43]A copy of the chart offered by the Justice Department to the Committee on Ways and Means is annexed as Addendum III to petitioner's brief.

ultimately passed by both houses.[44] The special parole and conspiracy provisions were included in H.R. 18583 in the same terms as had been employed in H.R. 17463. In the "Section-by-Section Analysis" of the Interstate and Foreign Commerce Committee's accompanying report[45] analyzing the bill, the intended meaning of "punishment" in §406 of the bill (corresponding to 21 U.S.C. §846) is explained as follows:

> Section 406 provides that any person who attempts or conspires to commit any offense defined in this title may be punished by imprisonment and/or fine which may not exceed the maximum *amount* set for the offense, the commission of which was the object of the attempt or conspiracy. [Emphasis supplied.][46]

The use of the word "amount" to explain the meaning of "punishment" in §846 provides clear proof that "punishment" was intended merely as a reference back to "imprisonment or fine or both" and was not intended to establish a broader range of sentences than that stated in the antecedent clause. Had Congress meant for §846's second clause ("not to exceed . . .") to be independent of the first clause ("punished by . . ."), it would not have defined "punishment" as "amount." When "amount" is substituted for "punishment," the second clause, read independently of the first, has no meaning; only when the second clause is read as dependent upon the first clause does "amount" make any sense.[47]

[44]H.R. 18583 was passed in both houses (after amendments not relevant to this discussion) on October 14, 1970, after the conference report was agreed to (see 116 Cong.Rec. 36880, 36885 (Senate) and 36651, 36655 (House) (91st Cong., 2d Sess., 1970)), and was enacted as the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513 (see note 28, *ante*).

[45]H.R. Rep. No. 91-1444 of the Interstate and Foreign Commerce Committee, September 10, 1970, to accompany H.R. 18583, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4566; see 116 Cong.Rec. 31273 (91st Cong., 2d Sess., 1970).

[46]H.R. Rep. No. 91-1444, note 45, *ante*, at 50, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4617.

[47]*Cf. Malat v. Riddell*, 383 U.S. 569, 571 (1966) (words of statute should be read in ordinary, everyday sense).

Two conclusions are evident from the foregoing. First, under every bill drafted by both houses of the Ninety-first Congress on drug abuse, punishment for conspiracy was designated to be imprisonment and/or fine. Second, nowhere in the legislative history is there direct consideration of the intended scope of the new special parole provision, and specifically of its application to the conspiracy section. The first point requires no further discussion. This consistent expression of the terms of punishment, with its longstanding and well understood meaning, is sound proof that the same expression in §846 was intended to denote, as it always had, imprisonment and/or fine exclusively. The second point, however, invites a broader examination of Congress' response to the introduction of special parole. By this statutory evolution—by Congress' actions and inactions—the intended scope of this new provision can be discerned, and it is to this point that we now turn.

B.

Section 841(c), in setting forth the operation of special parole, refers to its imposition "in this section [§841] or section 845." This statement alone is some indication of Congress' intent that special parole be included only in those specified sections, and not in §846. But should there be any question as to Congress' intent—any suggestion that "this section" was intended to encompass §846 sentencing (but see Part I-A, *ante*) or that the limitation to two sections was inadvertent—the legislative history dispels this doubt. This explicit reference to the two sections represents an amendment to both S.3246 and H.R. 17463, which, in their parallel provisions, referred to special parole as being "imposed under this Act." (S.3246, §501(d), see S.Rep. No. 91-613, note 36, *ante*, at 117; H.R. 17463, §501(d), see Hearings before Committee on Ways and Means at 62.) The substitution of specific sections for the general term "Act" to describe the provisions to which special parole would apply

demonstrates that H.R. 18583 and ultimately the Comprehensive Act were intended to restrict the applicability of special parole to those sections specified in 21 U.S.C. §841(c).

The express reference to special parole in §845, which establishes double punishments for those convicted of distribution to persons under age twenty-one, has been mentioned in Part I-B, *ante*, as evidence that Congress intended, by eschewing reference to special parole in §846, to limit punishment under this section to imprisonment and/or fine. This proposition, too, is supported by the legislative history. S.3246, §506, and H.R. 17463, §506[48]—the two immediate predecessors of H.R. 18583, §405 (21 U.S.C. §845)—provided only that a violation under these sections be punished by up to twice the authorized imprisonment and/or fine; neither section, notwithstanding the inclusion of special parole in the referenced substantive sections, made any provision for the inclusion of a special parole term. (S.3246, §506, see S.Rep. No. 91-613, note 37, *ante*, at 118-119; H.R. 17463, §506, see Hearings before Committee on Ways and Means at 66.) H.R. 18583, §405 initiated the change reflected in 21 U.S.C. §845: in addition to the doubling provisions for imprisonment and/or fine, a separate provision authorized twice the authorized term of special parole applicable. This action establishes that Congress was conscious that a section which was to include special parole must so state, and that even when there was a reference to another section in which special parole is provided, the special parole provision of the referenced section would carry over to the referencing section only if the latter so provided. Furthermore, this action establishes that Congress was conscientious in amending those sections intended to be subject to the new special parole provision so that their language would reflect this intent. It strains logic to construe the absence of a special parole reference in §846 as unintentional when, as to the immediately preceding §845, an

[48]Though these sections are not identical to §845 in various respects, *e.g.*, age of buyer specified, they are identical to §845 in all respects relevant to this discussion.

amendment to provide for special parole was recognized as necessary to effect Congress' purpose. As Mr. Justice Frankfurter stated (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (concurring opinion)):

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.

These conclusions are corroborated by a similar attentiveness to detail respecting the various second-offender proposals. The punishment for a second offender under S.2637, §508 was set in terms of imprisonment and/or fine; and the same provision is found in H.R. 13742, §508, and H.R. 13743, §508. Both the House and the Senate, in the first bills in which special parole was included—S.3246, H.R. 17463—amended their second-offender provisions to provide separately for enhancement of any applicable special parole term. (S.3246, §508; H.R. 17463, §508.) The Comprehensive Act, moreover, retains these provisions in substance, although it replaces a separate and generally applicable second-offender section with second-offender provisions within each individual section's sentencing provision.[49] Again, Congress displayed its awareness of the need to conform sections affected by the introduction of special parole, and again Congress allowed the conspiracy section to stand unamended.

Indeed, when the amendments to both the second-offender section and the distribution to minors section are viewed together, there were three occasions—S.3246, H.R. 17463, H.R. 18583—when Congress established the applicability of special

[49]In the import/export subchapter, there is a separate second offender section applicable generally to all sentencing provisions. See §962. This section also expressly provides for enhancement of any applicable special parole term.

parole to a specific section by amending statutory language restricted to imprisonment and/or fine, and when Congress declined to amend in similar fashion the conspiracy section.

These developments in the applicability of special parole prove that Congress was cautious in its choice of language and that the retention, through various revisions, of "imprisonment or fine or both" with respect to conspiracy represents an affirmative action by Congress. Thus, Congress' intention in this matter is reflected in the statutory language, and there can be no justification for the construction urged by the Government, so clearly at odds with this criminal statute's plain meaning.

III.

Petitioner's Reading Of The Statute So As To Preclude Application Of The Special Parole Provision To Conspiracy Is Rational And Does Not Lead To Unreasonable Results.

A reading of the statute so as to exclude special parole from a §846 sentence results in an interpretation that is consistent with the overall structure of the Comprehensive Act and frustrates no law enforcement policy. Once this Court has concluded that §846 is written to punish conspiracy by imprisonment and/or fine exclusively, and that no proof of a contrary legislative intent is forthcoming, it is not the wisdom of Congress' action, but the absence of unreasonable results, which commands its acceptance.[50]

In Part I-B, *ante*, a chart is presented showing the various drug crimes and their respective penalties. The entries reveal that no

[50]See, *e.g.*, *In re Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *CIR v. Brown*, 380 U.S. 563, 571 (1965); *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940).

independent criterion determines the applicability of special parole. Seriousness of the crime does not invoke the special parole provision; the most heavily penalized (§848), the most leniently penalized (§844), and some in the middle range (*e.g.*, §843) are immune from special parole. Nor is special parole an incident to every sentence under §841(b), contrary to the assertion of the court in *United States v. Burman, supra*, 584 F.2d at 1358, quoted approvingly below, A.14-15; a prison sentence under §841(b)(3) does not carry an additional special parole term. And when Congress added §841(d) in 1978, which provides for a prison term of up to five years and a fine of up to $15,000—exactly the same limits applicable to §841(b)(1)(B), the substantive section implicated in petitioner's conspiracy—it did not include special parole as a component of sentence. Thus, the apparent characteristic common to every section which includes special parole is that special parole is expressly required, and from the standpoint of the statute's structure as a whole, it cannot be deemed irrational to hold special parole excluded from a conspiracy sentence under §846, which contains no such specification.

The non-applicability of special parole to §846 is also reasonable with respect to law enforcement concerns. Conspiracy may constitute as serious a danger as a substantive crime. See *Callahan v. United States*, 364 U.S. 587, 593-594 (1961); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). Thus, the punishment for conspiracy, notwithstanding the inchoate nature of the crime,[51] may be severe and need not be less than punishment for related substantive acts. This does not necessitate equality of punishments, however. Even narrowing the field to Congressional enactments, the clearest conclusion is that the punishments for conspiracy vary widely: under these

[51]The crime defined in §846 is particularly inchoate, in that, unlike the general federal conspiracy statute, 18 U.S.C. §371, no overt act is required in order to complete the crime. See, *e.g.*, *United States v. Bermudez*, 526 F.2d 89, 94 and n.1 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

conspiracy provisions, the punishment prescribed can be either independent of or related to assorted substantive crimes, and may be more than, less than, or equal to that prescribed for the substantive act.[52] Because Congress has exhibited no definite

[52]The variety in federal treatment of conspiracy is considerable. The general federal conspiracy statute, 18 U.S.C. §371, which carries a five-year maximum term of imprisonment, is applicable to criminal activities which, as substantive acts, are subject to punishments greater than, as well as less than, five years. For instance, the following substantive acts, subject to prosecution for conspiracy under 18 U.S.C. §371, are among those punished more severely than the associated conspiracy:

18 U.S.C. §81	arson
18 U.S.C. §112	assault on foreign official with deadly weapon
18 U.S.C. §113	aggravated assault
18 U.S.C. §963	armed vessels (see also 18 U.S.C. §§964, 965, 966, 967)
18 U.S.C. §1111	murder
18 U.S.C. §2031	rape
18 U.S.C. §2113	bank robbery/burglary
18 U.S.C. §2275	firing/tampering with vessels

The following substantive acts, subject to prosecution for conspiracy under 18 U.S.C. §371, are among those punished less severely than the associated conspiracies:

18 U.S.C. §112	assault on foreign official without deadly weapon
18 U.S.C. §542	statement to defraud Customs
18 U.S.C. §§599-607	election violations
18 U.S.C. §912	false personation of official
18 U.S.C. §1012	HUD violations
18 U.S.C. §1084	interstate transmission of gambling information
18 U.S.C. §§1301-1302	lottery offenses
18 U.S.C. §1381	inciting desertion in Armed Forces
18 U.S.C. §1464	broadcasting obscenity
18 U.S.C. §1705	mischief *re*: post boxes, mail

Some sections not subject to 18 U.S.C. §371 prohibit both the substantive act and conspiracy, and provide for the same punishment to be applicable to either type of violation. The following are examples:

15 U.S.C. §72	importation violation
16 U.S.C. §831t	conservation violation (*re*: TVA)

(continued)

intention with respect to the punishment applicable to conspiracy, the fact that a drug conspiracy might not be punished exactly like an underlying substantive act does not establish an unreasonable result.

Furthermore, as to the large scale conspiratorial activity which poses the most substantial threat to the public, punishment provisions other than §846 were included in the Comprehensive Act to insure punishment not equal to, but greater than, the punish-

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(footnote continued from preceding page)

18 U.S.C. §351	Congressional assassination
18 U.S.C. §§793, 794	National defense information
18 U.S.C. §1201	kidnapping
18 U.S.C. §1751	assassination of President
18 U.S.C. §1792	prison riot
18 U.S.C. §1951	robbery/extortion obstructing interstate commerce
18 U.S.C. §§2153, 2154 2155, 2156	war materials, national defense materials
18 U.S.C. §2388	military insubordination (wartime)
33 U.S.C. §990	navigable waters (fraud in compensation)
40 U.S.C. §193h	Capitol grounds
42 U.S.C. §1973j	residence requirements for voting
42 U.S.C. §§2273, 2274, 2275, 2276, 2277,	atomic energy
47 U.S.C. §509	telephones, telegraphs, etc.—contests

There are also sections which expressly apply to conspiracy without any provision for substantive violations. Such sections include:

15 U.S.C. §§1, 2	antitrust
18 U.S.C. §241	rights of citizens
18 U.S.C. §286	defraud Government
18 U.S.C. §372	impede/imperil officer
18 U.S.C. §956	injure property of foreign government
18 U.S.C. §2384	sedition
42 U.S.C. §1985	interference with civil rights
50 U.S.C. §783	establish totalitarian dictatorship

The lack of any consistent rule as to the punishment for conspiracy is thus manifest, and the proposition that a 21 U.S.C. §846 violation must be punished identically to the underlying substantive acts finds no support in the punishment provisions applicable to other conspiracy sections.

ment authorized in §841. First, §849 establishes special sentencing procedures for the "dangerous special drug offender;" and the definition of "special drug offender" includes as one of three alternatives a four-person conspiracy engaged in a pattern of drug violations (§849(e)(3)). Second, §848 establishes, as a separate crime, "continuing criminal enterprise;" this pertains expressly to the organizers or supervisors of conspiracies involving a minimum of six persons engaged in a continuous enterprise of serious drug violations (§848(b)). A person sentenced as a dangerous special drug offender is subject to up to twenty-five years' imprisonment (§849(b)), and a person convicted under the continuing criminal enterprise section is subject to a prison term not less than ten years and up to life, as well as a fine not more than $100,000 and specified forfeitures (§848(a)(1) and (2)).[53] Thus, there is sufficient authorization for severe punishment of the most dangerous conspiracies to preclude a finding that the lesser penalty under §846 vis-a-vis §841—that is, the absence of special parole—gives rise to unreasonable results.

Any reading of §846 grounded not in what Congress did but in what it might have done would involve this Court in judicial legislating. Thus, even an explanation for Congress' failure to amend §846 grounded in inadvertence does not provide sufficient reason to disregard what the statute commands. Mr. Justice Frankfurter, in *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 534 (1947), quoted Mr. Justice Brandeis in *Iselin v. United States*, 270 U.S. 245, 250-251 (1926), and added his own observation:

> "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope." An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend this inclusion.

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[53]Neither of these sections provides for the inclusion of a special parole term.

Section 846 as written—without special parole—is perfectly reasonable, and the letter of the law should be enforced.

IV.

A Conclusion That There Is Ambiguity Concerning The Ambit Of The Special Parole Provision Vis-A-Vis §846 Should Be Resolved Against The Inclusion Of Special Parole Under The Doctrine Of Lenity.

The interpretation offered by the court of appeals below and by the Government is not easily reconciled with the plain language of the statute; to follow this reading may, as just noted, lead this Court to perform a statutory surgery properly left to Congress. This suggests that, should the Court not accept our analysis, the most the Government can do is establish that the statute is ambiguous. To conclude that special parole is incorporated within "imprisonment or fine or both," notwithstanding Congress' resolute retention of this phase after the enactment of the special parole provision, "would not only take liberties with the language and legislative history of [the statute], it would also contravene this Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." See *Dunn v. United States*, ——U.S——, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979).

Should the Court view the statutory materials as inconclusive on the issue of whether §846 incorporates special parole, the narrower reading advanced in this brief should be accepted. This Court has long followed the "wise principle" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971), quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971).[54] The

[54]See also *United States v. Batchelder*, —— U.S. ——, 99 S.Ct. 2198, 2202-2203, 60 L.Ed.2d 755, 763 (1979); *Dunn v. United States*, *(continued)*

Court has confirmed, moreover, that this doctrine is equally applicable to the construction of penal sentencing statutes. See *United States v. Batchelder*, —— U.S. ——, 99 S.Ct. 2198, 2202-2203, 60 L.Ed.2d 755, 763 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Ladner v. United States*, 358 U.S. 169, 178 (1958).[55] Because the Government can point to nothing in the language or the history which establishes, with requisite certainty, that Congress intended special parole to supplement the prison sentence specified in §846, the most the Government can establish is that the issue is subject to some doubt, and lenity compels our narrower reading.

In *United States v. Bass, supra*, 404 U.S. at 348, the Court described lenity as resting on two principles. The first entails the policy of "fair warning." The second is the rationale framed by Judge Friendly:[56] "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." This last point is particularly apt here in light of the potentially severe consequences of an additional special parole term.

(footnote continued from preceding page)

—— U.S. ——, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979); *United States v. Naftalin*, —— U.S. ——, 99 S.Ct. 2077, 2084, 60 L.Ed.2d 624, 633 (1979); *United States v. Culbert*, 435 U.S. 371, 379 (1978); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978); *Scarborough v. United States*, 431 U.S. 563, 577 (1977); *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *Ladner v. United States*, 358 U.S. 169, 178 (1958); *Bell v. United Sta' s*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952); H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 208-209 (1967).

[55]*Cf. United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971); *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905) (a person "is not to be subjected to a penalty unless the words of the statute plainly impose it").

[56]H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate petitioner's special parole term as unlawfully imposed under §846.

Respectfully submitted,

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ADDENDUM I

CRIMINAL INDICTMENT

UNITED STATES v. JOHN McFARLAND, MICHAEL THISTLETHWAITE, ALPHONSE BIFULCO, MARIO BIFULCO, and ROSEANN POLIMENI

Eastern District of New York 76 Cr. 822

Filed December 30, 1976

THE GRAND JURY CHARGES:

From in or about and between June 1975 up to the date of the filing of this indictment, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOHN McFARLAND, also known as John Kane, MICHAEL THISTLETHWAITE, also known as Mike Thistle, ALPHONSE BIFULCO, MARIO BIFULCO and ROSEANN POLIMENI together with Larry DeMaio, Robert Borsillino, John Kowalchick, and Stephen Kopf, named herein as co-conspirators but not as defendants, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally manufacture substantial quantities of phencyclidine, a Schedule III controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the con-

spiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846.)

A TRUE BILL

/s/ Victoria Klepper
VICTORIA KLEPPER

/s/ David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

ADDENDUM II

COMPARISON OF PENALTY STRUCTURES BETWEEN S. 3246 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

116 Cong. Rec. 1654

(91st Cong., 2d Sess., 1970)

COMPARISON OF PENALTY STRUCTURES BETWEEN S. 3246 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

Violation	Law applicable	Maximum fine	Sentence (years)	Special parole term	Probation or suspended sentence permitted	Parole permitted
Unlawful distribution, possession with intent to distribute, manufacture, importation and exportation, etc.	Present law:					
	Narcotics	$20,000	5 to 20	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	10,000	Up to 5	No	Yes	Yes.
(1st offense)	S. 3246:					
Note: Under existing Federal law, possession with intent to distribute is not a separate offense.	I and II narcotics	25,000	Up to 12	At least 3 years	Yes	Yes.
	I and II nonnarcotic and III substances	15,000	Up to 5	At least 2 years	Yes	Yes
	IV substances	5,000	Up to 1	No	Yes	Yes.
(2d offense)	Present law:					
	Narcotics	20,000	10 to 40	No	No	No.
	Marihuana	20,000	do	No	No	No.
	Dangerous drugs	20,000	Up to 5	No	Yes	Yes
	S. 3246:					
	I and II narcotics	50,000	Up to 24	At least 6 years	Yes	Yes.
	I and II nonnarcotic and III substances	30,000	Up to 10	At least 4 years	Yes	Yes.
	IV substances	10,000	Up to 2	No	Yes	Yes.

Violation	Law applicable	Maximum fine	Sentence (years)	Probation or suspended sentence permitted	Parole permitted
Simple possession (First offense)	Present law:				
	Narcotics	$20,000	2 to 10	Yes	Yes.
	Marihuana	20,000	do	Yes	Yes.
	Dangerous drugs	1,000	Up to 1	Yes	Yes.
	S. 3246:				
	I and II narcotics	5,000	do	Yes	Yes.
	I and II nonnarcotic and III substances	5,000	do	Yes	Yes.
	IV substances	5,000	do	Yes	Yes.
(2d offense)	Present law:				
	Narcotics	20,000	5 to 20	No	No.
	Marihuana	20,000	do	No	Yes.
	Dangerous drugs	1,000	Up to 1	Yes	Yes.
	S. 3246:				
	I and II narcotics	10,000	Up to 2	Yes	Yes.
	I and II nonnarcotics and III substances	10,000	do	Yes	Yes.
	IV substances	10,000	do	Yes	Yes.
Distribution of small amounts of marihuana for no profit	Present law:				
	No applicable provisions.				
	S. 3246:				
(1st offense)		5,000	1	Yes	Yes.
(2d offense)		15,000	Up to 10	Yes	Yes.
Continuing criminal enterprise	Present law:				
	No applicable provisions.				
	S. 3246:				
(1st offense)		50,000	5 to life	No	No.
(2d offense)		100,000	10 to life	No	No.

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VIOLATION	
Distribution to persons under the age of 18	S. 3246 provides that any person over 18 who knowingly and intentionally violates subsec. 501(a)(1) by distributing a substance classified in schedules I or II which is a narcotic to a person under 18 years of age who is at least 3 years his junior is punishable by a term of imprisonment twice that authorized by subsec. 501(c)(1), by a fine of $25,000, or both. Distribution of any other controlled dangerous substance classified in schedules I, II, III or IV by a person over 18 to a person under 18 who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized under subsec. 501(c)(2) or (3), by the fine authorized under subsection 501(c) (2) or (3), or both. For any of these offenses, imposition or execution of sentences cannot be suspended and probation cannot be granted. Under existing Federal law, distribution of narcotics or marihuana by a person over 18 to a person under 18 years of age is punishable by imprisonment for not less than 10 years nor more than 40 years and, in addition, may be fined not more than $20,000. Imposition or execution of such sentence cannot be suspended and probation cannot be granted. In addition, if the offense involves a narcotic drug, the parole provisions under Federal law shall not apply. Under the Drug Abuse Control Amendments of 1965, a person over 18 who distributed dangerous drugs to a person under 21 years of age is punishable by imprisonment for not more than 10 years, a fine not exceeding $15,000, or both. A second offense is punishable by imprisonment for not more than 15 years, a fine not exceeding $20,000, or both.
Conditional discharge for possession as 1st offense.	S. 3246 provides that a court may, upon finding any person guilty of possessing a controlled dangerous substance without intent to distribute, and who has not previously been convicted under any Federal or State law relating to narcotic drugs, marihuana, stimulant, depressant, or hallucinogenic drugs, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require. Upon violation of the terms of probation, the court may enter an adjudication of guilt and proceed as provided by the respective acts. Upon fulfillment of the terms of probation, the court shall discharge the person and dismiss the proceedings. Such discharge shall not be deemed a conviction for the purposes of the disabilities imposed by law upon persons convicted of crimes. However, such discharge and dismissal under these sections is available only once with respect to any person. There are no provisions for 1st-offender treatment under present Federal law for offenses involving possession of narcotics or marihuana. There is a provision allowing for 1st-offender treatment under the Drug Abuse Control Amendments of 1965, but it is applicable only to cases involving possession of dangerous drugs.
Endeavor and conspiracy	S. 3246 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense. Present Federal law provides that any person who conspires to commit an offense under any of the acts may be punished by imprisonment and/or fine not exceeding the maximum punishment proscribed for committing the offense. Attempt to commit an offense under any of the existing acts is not punishable as an offense.

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ADDENDUM III

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED SUBSTANCES ACT OF 1969) AND PRESENT LAW

Hearings before Committee on Ways and Means

***re*: H.R. 13742 and H.R. 17463 (July 1970) at 229-230**

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

Violation	Law applicable	Maximum fine	Sentence	Special parole term	Probation or suspended sentence permitted	Parole permitted
Unlawful distribution, possession with intent to distribute, manufacture, importation, and exportation, etc.:						
1st offense	Present law:					
	Narcotics	$20,000	5 to 20 years	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	10,000	Up to 5 years	No	Yes	Yes.
	H.R. 17463:					
	I and II narcotics	25,000	Up to 12 years	(1)	Yes	Yes.
	I and II nonnarcotic and III substances.	15,000	Up to 5 years	(2)	Yes	Yes.
	IV substances	5,000	Up to 1 year	No	Yes	Yes.
2d offense	Present law:					
	Narcotics	20,000	10 to 40 years	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	20,000	Up to 5 years	No	Yes	Yes.
	H.R. 17463:					
	I and II narcotics	50,000	Up to 24 years	(3)	Yes	Yes.
	I and II nonnarcotic and III substances.	30,000	Up to 10 years	(4)	Yes	Yes.
	IV substances	10,000	Up to 2 years	No	Yes	Yes.
Simple possession:						
1st offense	Present law:					
	Narcotics	20,000	2 to 10 years		Yes	Yes.
	Marihuana	20,000	do		Yes	Yes.
	Dangerous drugs	1,000	Up to 1 year		Yes	Yes.
	H.R. 17463:					
	I and II narcotics	5,000	do		Yes	Yes.
	I and II nonnarcotics and III substances	5,000	do		Yes	Yes.
	IV substances	5,000	do		Yes	Yes.
2d offense	Present law:					
	Narcotics	20,000	5 to 20 years		No	No.
	Marihuana	20,000	do		No	Yes.
	Dangerous drugs	1,000	Up to 1 year		Yes	Yes.
	H.R. 17463:					
	I and II narcotics	10,000	Up to 2 years		Yes	Yes.
	I and II nonnarcotics and III substances	10,000	do		Yes	Yes.
	IV substances	10,000	do		Yes	Yes.

See footnotes at end of table.

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW—Continued

Violations	Law applicable	Maximum fine	Sentence	Probation or suspended sentence permitted	Parole permitted
Distribution of small amounts of marihuana for no profit.	Present law: No applicable provisions.				
	H.R. 17463:				
1st offense		$5,000	1 year	Yes	Yes.
2d offense		15,000	Up to 10 years	Yes	Yes.
Continuing criminal enterprise.	Present law: No applicable provisions.				
	H.R. 17463:				
1st offense		50,000	5 years to life	No	No.
2d offense		100,000	10 years to life	No	No.
Conditional discharge for possession as 1st offense	(5)				
Endeavor and conspiracy	(6)				
Distribution of persons under the age of 18	(7)				

1 At least 3 years.
2 At least 2 years.
3 At least 6 years.
4 At least 4 years.

5 H. R. 17463 provides that a court may, upon finding any person guilty of possessing a controlled dangerous substance without intent to distribute, and who has not previously been convicted under any Federal or State law relating to narcotic drugs, marihuana, stimulant, depressant, or hallucinogenic drugs, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require. Upon violation of the terms of probation, the court may enter an adjudication of guilt and proceed as provided by the respective acts. Upon fulfillment of the terms of probation, the court shall discharge the person and dismiss the proceedings. Such discharge shall not be deemed a conviction for the purposes of the disabilities imposed by law upon persons convicted of crimes. However, such discharge and dismissal under these sections is available only once with respect to any person.

There are no provisions for 1st offender treatment under the present Federal law for offenses involving possession of narcotics or marihuana. There is a provision allowing for 1st offender treatment under the Drug Abuse Control Amendments of 1965, but it is applicable only to cases involving possession of dangerous drugs.

6 H.R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense.

Present Federal law provides that any person who conspires to commit an offense under any of the acts may be punished by imprisonment and/or fine not exceeding the maximum punishment proscribed for committing the offense. Attempt to commit an offense under any of the existing acts is not punishable as an offense.

7 H.R. 17463 provides that any person over 18 who knowingly and intentionally violates subsec. 501(a)(1) by distributing a substance classified in schedules I or II which is a narcotic to a person under 18 years of age who is at least 3 years his junior is punishable by a term of imprisonment twice that authorized by subsec. 501(c)(1), by a fine of $25,000, or both. Distribution of any other controlled dangerous substance classified in schedules I, II, III, or IV by a person over 18 to a person under 18 who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized under subsec. 501(c) (2) or (3), by the fine authorized under subsec. 501(c) (2) or (3) or both. For any of these offenses, imposition or execution of sentences cannot be suspended and probation cannot be granted.

Under existing Federal law, distribution of narcotics or marihuana by a person over 18 to a person under 18 years of age is punishable by imprisonment for not less than 10 years nor more than 40 years and, in addition, may be fined not more than $20,000. Imposition or execution of such sentence cannot be suspended and probation cannot be granted. In addition, if the offense involves a narcotic drug, the parole provisions under Federal law shall not apply. Under the Drug Abuse Control Amendments of 1965, a person over 18 who distributed dangerous drugs to a person under 21 years of age is punishable by imprisonment for not more than 10 years, a fine not exceeding $15,000, or both. A 2d offense is punishable by imprisonment for not more than 15 years, a fine not exceeding $20,000, or both.

Note: Under existing Federal law, possession with intent to distribute is not a separate offense.